Supreme Court, U.S.
FILED
MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-942

In the Supreme Court of the United States

OCTOBER TERM, 1987

DON R. SPEER,
Petitioner,

vs.

OTTAWAY NEWSPAPERS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

PADEN, WELCH, MARTIN & ALBANO, P.C.
MICHAEL W. MANNERS
Counsel of Record
Law Building - 311 West Kansas
Independence, Missouri 64050
(816) 836-8000
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Table of Authorities i
Reasons for Granting the Writ 1
Conclusion 7

TABLE OF AUTHORITIES

Cases

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) 2-3
Buckley v. Knapp, 48 Mo. 152 (1871) 6
The Conqueror, 166 U.S. 110 (1897) 2
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 2
Laun v. Union Electric Co. of Missouri, 350 Mo. 572, 166 S.W.2d 1065, 144 A.L.R. 622 (1943) 5, 6
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 2, 5, 6, 7
St. Amant v. Thompson, 390 U.S. 727 (1968) 4
Sharon v. Time, Inc., 599 F.Supp. 538 (S.D.N.Y. 1984) 7
Warner v. K.C. Star Co., 726 S.W.2d 384 (Mo.App. 1987) 4
Wilkerson v. McCarthy, 336 U.S. 53 (1949) 2

Other Sources

9 C. Wright & A. Miller, *Federal Practice and Procedure*, §2537 (1971) 2
W.B. Odgers, *A Digest of the Law of Libel and Slander* (1881) 6

No. 87-942

In the Supreme Court of the United States

OCTOBER TERM, 1987

DON R. SPEER,
Petitioner,

VS.

OTTAWAY NEWSPAPERS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

REASONS FOR GRANTING THE WRIT

I. The District Court and Court of Appeals Improperly Weighed the Evidence in Deciding the Propriety of Judgment Notwithstanding the Verdict.

In Point I of his Petition for Writ of Certiorari, Petitioner argued that the district court and the Court of Appeals erred by relying on evidence adduced by *Respondent* in determining that Petitioner failed to make a submissible case of actual malice. Petitioner argued that reliance on Respondent's evidence invaded the province of the jury since the jury was free to disregard the testimony of any witness called by Respondent, even if it was wholly un-

contradicted, *The Conqueror,* 166 U.S. 110, 131 (1897). For that reason, Petitioner argued, the action of the lower courts disregarded the fundamental rule, mandated by the Seventh Amendment, that in passing on the sufficiency of the evidence to submit an issue to the jury, courts may look *only* to the evidence supporting the party against whom a motion for directed verdict is filed, *Wilkerson v. McCarthy,* 336 U.S. 53, 57 (1949), and must consider such evidence "in its strongest light in favor of the party against whom the motion . . . was made . . . ." *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 696 n. 6 (1962).[1]

In Point II of its Brief in Opposition Respondent tacitly concedes much of this argument.[2] Thus, it does not deny that the Seventh Amendment ordinarily prohibits federal courts from weighing evidence in ruling on a motion for judgment notwithstanding the verdict. Nor does it deny that in the case at bar the lower courts weighed the evidence when they found the nonexistence of malice based on, for example, testimony by one of Respondent's editors that two independent witnesses to the incident called him and verified McCoy's story. Rather than denying any of these things, Respondent makes two points on the issue raised in Point I of the Petition.

First, it recites the familiar principle articulated in *New York Times Co. v. Sullivan,* 376 U.S. 254, 285 (1964), and *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S.

---

1. The standards for deciding a motion for directed verdict and a motion for judgment notwithstanding the verdict are the same, 9 C. Wright & A. Miller, *Federal Practice and Procedure,* §2537, at 599 (1971).

2. For some reason Respondent addresses Petitioner's arguments in reverse order. Hence, Point II of its Brief responds to Point I of the Petition for Certiorari.

485, 511 (1984), that federal courts must make an independent examination of the whole record in determining whether actual malice is present in a libel case. Unfortunately, Respondent is content to stop at that point. It never addresses the next logical question: Does that mean that in libel cases federal courts may make their own credibility determinations and are not required to view the evidence in the light most favorable to the plaintiff in deciding whether to grant judgment n.o.v.? Although Respondent argued in the lower courts that traditional rules about weighing evidence do not apply to libel cases, its silence on that crucial point in this Court is deafening.

Respondent's second point is that even if the lower courts had declined to weigh evidence, Petitioner still failed to make a submissible case on the issue of malice because he "presented no evidence suggesting that the editors had any reason for doubting the reporter's credibility." (Brief in Opposition at 11.)

Petitioner will not recite all of the evidence which supported his claim of malice; one clear fact controversy demonstrates the absurdity of Respondent's argument. At trial Petitioner called Hazel Bearden as a witness. Ms. Bearden was one of the persons participating in the demonstration in front of the bar. On April 25, 1983, the day before the editorial at issue was published, Ms. Bearden called the *Globe* to complain about an article published on April 24 which recited McCoy's version of what happened. If the evidence is viewed in the light most favorable to Petitioner, giving him the benefit of all legitimate inferences, the jury could find that Ms. Bearden talked to Tom Murray, Managing Editor of the *Globe*, and told him that McCoy's version of what happened was "a pack of lies." Mr. Murray denied ever talking to Ms. Bearden.

The Eighth Circuit discounts Ms. Bearden's testimony by noting that "at least two eyewitnesses had corroborated McCoy's version." 824 F.2d, at 478. Of course the only evidence that two eyewitnesses had corroborated McCoy's story came from Murray, the man to whom the eyewitnesses allegedly made the statement.[3] (Neither independent witness testified at trial.) This evidence came in during *Respondent's* case.

If the jury disbelieved Murray's testimony about what independent eyewitnesses allegedly told him and his denial that he talked to Ms. Bearden, then her testimony stands undisputed. The devastating effect of that testimony is best measured by Murray's concession that if the conversation with Bearden had occurred, it would have caused him to stop publication of the editorial, at least until further investigation could have been made into McCoy's fantasy. If the jury believed Ms. Bearden and disbelieved Murray's testimony that he never talked to Ms. Bearden, then it had every reason to find that the *Globe* "entertained serious doubts as to the truth" of the editorial, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

Respondent's assertion that the lower courts did not have to weigh evidence in order to conclude that Petitioner failed to make a submissible case is further belied by the heavy reliance by both the district court and the Court of Appeals on evidence developed in Respondent's case. Unfortunately, the lower courts in this case are not alone in believing that credibility determinations in libel cases are not the exclusive province of the jury, *see e.g., Warner v. Kansas City Star Co.*, 726 S.W.2d 384, 390 (Mo.App. 1987).

---

3. This evidence was admitted over Petitioner's hearsay objection to show its effect on Murray's state of mind.

The instant case provides an excellent vehicle for determining the continuing vitality of the Seventh Amendment in libel cases.

II. The District Court and Court of Appeals' Opinions Improperly Applied Rules of Respondeat Superior in This Case by Failing to Impute the Knowledge of Respondent's Employer to Respondent.

Point I of Respondent's Brief in Opposition boils down to an argument that McCoy did not have "responsibility for the publication" of the defamatory matter in the editorial, *New York Times, supra,* 376 U.S., at 287. Stripped of its verbiage, this amounts to a claim that if a person does not write something or have responsibility for deciding whether to print it, he is not responsible for its publication.

Respondent's argument overlooks entirely what is meant by the term "publication" in defamation law. In *Laun v. Union Electric Co. of Missouri,* 350 Mo. 572, 166 S.W.2d 1065, 1070, 144 A.L.R. 622 (1943), the court held that the term "publication" includes a great deal more than simply disseminating information:

> The fundamental basis of the law of defamation is that one is liable for an unprivileged communication or publication of false and defamatory matter which injures the reputation of another. [Citations omitted.] The *actual publisher* (meaning "any act whereby the defamatory matter is intentionally or negligently communicated to a third person" [citation omitted]) is not alone legally responsible for the defamatory publication but "all who in anywise aid or are concerned in the production of the writing are liable as pub-

> lishers; *the publication of the writing is the act of all concerned in the production of the writing.* Thus, if one composes and dictates, a second writes, and a third publishes, all are liable as publishers, and each is liable as a publisher." [Citations omitted.] Liability attaches to one who requests, *aids, or procures* another to publish the defamatory matter, "the procurer is guilty of a publication whenever it takes place."

(Emphasis added.) Hence, the law denominates all who in anywise aid the production of the writing as "publishers", *Buckley v. Knapp*, 48 Mo. 152, 159 (1871). A request to publish defamatory matter need not be express; it may be inferred from conduct, such as making a statement to a reporter for a newspaper with the knowledge that it is sure to be published, W.B. Odgers, *A Digest of the Law of Libel and Slander* at 155 (1881).

Under these standards McCoy was a person "legally responsible for the defamatory publication," *Laun, supra*, 166 S.W.2d, at 1070. It was uncontroverted that McCoy both obtained the information used in the editorial and disseminated it to his superiors while acting in the scope and course of his employment.[4] So far as the law of libel is concerned, McCoy's knowledge of the falsity of the allegation that Petitioner kicked and beat him while

---

4. The fact that McCoy was intimately involved in the process whereby the *Globe* obtained the information used in the editorial distinguishes this case from *New York Times*. As Respondent correctly notes, the *Times* was absolved from liability by this Court even though some of its employees knew of the falsity of the facts appearing in the defamatory advertisement. However, unlike the case at bar, there was no indication in *New York Times* that any of the employees possessing such knowledge had anything to do with publication of the advertisement.

he was handcuffed and defenseless—which knowledge Respondent does not deny in this Court—is the knowledge of a person having responsibility for the publication of the editorial.

The contrary holding of the lower courts warrants certiorari. It can hardly be gainsaid that modern newspapers are journalistic bureaucracies. Like other kinds of corporations they have divisions of labor, and not everyone who contributes to a story actually shares in its writing. Thus, it is not unusual for a number of employees to contribute information used in composing an article written by someone else, *see e.g., Sharon v. Time, Inc.,* 599 F.Supp. 538 (S.D.N.Y. 1984). To permit newspaper corporations to escape liability by compartmentalizing who knows what will not further the ends sought to be achieved by this Court in *New York Times.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PADEN, WELCH, MARTIN & ALBANO, P.C.
MICHAEL W. MANNERS
Counsel of Record
Law Building - 311 West Kansas
Independence, Missouri 64050
(816) 836-8000
Attorneys for Petitioner